



STATE OF INDIANA

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October 29, 2012

Mr. :Douglas-Alan
3630 East State Road 14
Columbia City, Indiana 46725

Re: Formal Complaint 12-FC-311; Alleged Violation of the Access to Public Records Act by the Wabash County Commissioners

Dear Mr. :Douglas-Alan:

This advisory opinion is in response to your formal complaint alleging Wabash County Commissioners (“Commissioners”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* Stephen Downs, Attorney, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

As an initial note, the formal complaint that was submitted was difficult to comprehend. To that end, it is my interpretation that you allege that the Commissioners violated the APRA at its October 9, 2012 meeting when Attorney Downs stated that a Common Law Court would be prohibited pursuant to the Constitution, Indiana Code, and case law. Further, you allege that the Commissioners’ October 14, 2012 denial failed to comply with section 9 of the APRA. The written denial stated that the agency had no records that were responsive to your request. You further provide that the Commissioners failed to cite to the authority:

“to deny, restrict, and impair a setting a judicial proceeding according to the course of the common-law, trial by jury of your peers, and exercise said function of the office, separate and independent of judicial power of the State referenced in Article Seven of the Indiana Constitution, to review the proceedings in Cause No. 85-C01-1202-MI-153 failed in the Wabash Circuit Court. . .”

Lastly, you allege that the Commissioners required that you present identification prior to receipt of records.

In response to your formal complaint, Mr. Downs advised that the formal complaint that was submitted was unintelligible. Mr. Downs provided that the County

has responded to more than twenty (20) requests to inspect and copy public records that you have submitted. All responses were timely provided. To the extent the Commissioners have been able to understand your requests and such records existed, all records have been provided.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The Commissioners are a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Commissioners’ public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

As an initial matter, I.C. § 5-14-4-10, the counselor has the authority to issue advisory opinions to interpret the public access laws upon the request of a person or public agency. A person denied the right to inspect or copy records pursuant to the APRA may file a formal complaint with the Public Access Counselor’s Office. *See* I.C. § 5-14-5-6(2). Many of the issues that you have raised in your formal complaint are either unintelligible or outside the purview of this office. A request made pursuant to the APRA must be made with reasonable particularity and seek an actual record maintained by the agency. *See* I.C. § 5-14-3-3(a)(1). As such, I will only address those issues raised in your formal complaint where the Commissioners allegedly denied your request for records.

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c).

Generally, if a public agency has no records responsive to a public records request, the agency generally does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly

the [agency] could not be required to produce a copy....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. Here, the Commissioners advised in writing on October 14, 2012 that it did not maintain any records that were responsive to your request. As such, it is my opinion that the Commissioners did not violate the APRA by failing to produce a record that did not exist.

As to the requirement of providing identification prior to the receipt of records, Counselor Kossack addressed a similar issue in 2010. *See Opinion of the Public Access Counselor 10-FC-174*. Counselor Kossack opined:

With regard to the fact that the Form asks for a copy of the requester’s driver’s license and requires that the request be signed under oath, the APRA contains no such requirements. Thus, the burden is on the Prosecutor to show why such procedures are necessary. *See I.C. § 5-14-3-1*. In 2004, Counselor Davis issued an opinion regarding the legality of a public records request form used by a county planning commission. In that matter, the form restricted requesters’ ability to request public records to a certain category of records. Counselor Davis opined that the form violated the APRA, and she added that the form’s requirement that the request be typewritten was an illegal interference with the right to inspect and copy public records:

Upon review of the form provided to you, I find . . . that it allows a requestor to request access only to a certain type of information, not all public records maintained by the agency. Because the Commission failed to respond to your requests, I do not know if your request was or would have been denied on the basis that it was not submitted on the Commission’s form. To the extent that the Commission requires a person to submit requests for records on this form, and the form allows a person to request only a certain type or types of records and excludes requests for other records, use of that form denies and interferes with the exercise of a person’s right to inspect and copy the public records of the agency. Therefore, required use of such a form is a violation of the Access to Public Records Act. . . .

You further allege that the Commission requires that the records request form be typewritten. While an agency may require that a request for public records be submitted in writing, it cannot require that the request be typewritten. Few people have access to the means with which to submit a typewritten request. Therefore, requiring a request be in such a format denies and interferes with the exercise of a

person's right to inspect and copy the public records of a public agency.

Opinion of the Public Access Counselor 04-FC-167. Similarly here, unless the Prosecutor can show that requiring requesters to submit a request under oath with a copy of the requester's driver's license is necessary to safeguard confidential records or comply with some other applicable statute or rule, it is my opinion that such requirements interfere with the rights of a requester under subsection 3(a) of the APRA. *See Opinion of the Public Access Counselor 10-FC-174; See also Opinion of the Public Access Counselor 12-FC-202.*

As applicable here, I am unable to opine that the Commissioners acted contrary to the APRA due to the unintelligible nature of the formal complaint that has been filed. However, I would advise that the Commissioners note the requirements of the APRA and the previous guidance offered by our office regarding this issue and govern its actions accordingly.

CONCLUSION

Based on the foregoing, it is my opinion that the Commissioners did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Stephen Downs